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No. 841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

COUNTRY MUTUAL INSURANCE COMPANY, Bloomington, Illinois, (Defendant-Appellant),

Petitioner,

vs.

GUSTAV ANDEEN, Administrator of the Estate of Gustav K. Andeen, deceased; CONSTANCE ANDEEN, Executor of the Will of August Robert Carlson, Deceased, (Plaintiffs-Appellees),

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Illinois

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Illinois

To The Honorable, The Chief Justices and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Country Mutual Insurance Company, Bloomington, Illinois, (Appellant-Petitioner in the Supreme Court of Illinois, below) respectfully shows unto the Court:

This is a Petition for Writ of Certiorari to the Supreme Court of the State of Illinois to review a decision and judgment made and entered in said Court on September 22, 1966, whereby said Court denied your Petitioner's Petition For Leave To Appeal from a decision and judgment theretofore entered in the Appellate Court of Illinois, Third District (Klingbiel, C.J., and Hershey, Schaefer, House, Solfisburg and Underwood, JJ, sitting).

OPINIONS DELIVERED IN THE COURTS BELOW

This action was brought by the Respondents in the Circuit Court of the Fourteenth Judicial Circuit of Illinois, Rock Island County, Illinois, under an "Uninsured Motorist" clause in an automobile insurance policy effective August 9, 1963, issued by your Petitioner, in which policy the Respondent's decedent, Gustav K. Andeen, was the named insured. Plaintiffs (Respondents here) were awarded judgments in the total sum of $76,300. This Defendant appealed to the Appellate Court of Illinois, Third District, by Notice of Appeal and the judgments were affirmed. That decision is reported in 70 Ill. App. (2d) 357; 217 Northeastern Reporter (2d) 814 (1966). Petition for Leave to Appeal to the Supreme Court of Illinois was filed. That Court, without written opinion, denied this Petition September 22, 1966. Appended to the instant Petition for Certiorari is a copy of the Opinion of the Appellate Court of Illinois delivered upon the rendering of the judgment of that Court. There was no opinion filed in the Supreme Court of Illinois; denial of Petition for Leave to Appeal was by order only. There were no other opinions of any courts or administrative agencies.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked on the ground that the decision of the Supreme Court of Illinois, denying your Petitioner's Petition for Leave to Appeal to that Court, violates the Due Process and Jury Trial Guarantee clauses of the Constitution of the United States of America in that it, for the first time in this case, placed your Petitioner in the position of being deprived of its property without due process by over-riding your Petitioner's right, under its insurance policy, to arbitration and further by ratifying judgments below based upon factual findings without protecting your Petitioner's right to jury trial pursuant to jury demand duly filed. Respondent will contend that these constitutional questions were waived when the present Petitioner appealed to the Appellate Court of Illinois. This is not true because the Federal Constitution questions did not arise until the Supreme Court of Illinois entered its Order on September 22, 1966, rejecting your Petitioner's Petition for Leave to Appeal to that Court.

JUDGMENT SOUGHT TO BE REVIEWED

The judgment of the Supreme Court of Illinois, denying your Petitioner's Petition for Leave to Appeal, was entered September 22, 1966 (Page 672, Transcript).

STATUTORY PROVISIONS CONFERRING JURISDICTION

The decision of the Supreme Court of Illinois is repugnant to the following provisions of the Constitution of the United States of America in that it deprives this Petitioner of its property without due process of law and it also denies this Petitioner its right to jury trial:

Amendment (V) of the Constitution of the United States, is:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis added)"

It is also provided by Amendment (XIV) of the Constitution of the United States, in part, as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment (VII) of the Constitution of the United States also is:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

QUESTION PRESENTED FOR REVIEW

Does the judgment of the Supreme Court of Illinois, ratifying the judgment of the Appellate Court of Illinois, Third District, by refusing to review it, deprive the Petitioner of its rights under the United States Constitution by (1) denying its contractual right to arbitration under the provisions of the policy of insurance and forcing it to pay the judgments returned without protecting its right to arbitration and without its written consent to the underlying damages action, in accordance with the provisions of the insurance policy in violation of the Due Process Clauses; and (2) by approving judicial findings of fact without a jury verdict, notwithstanding the Respondent's jury demand?

PERTINENT CONSTITUTIONAL PROVISIONS

The decision of the Supreme Court of Illinois is violative of the following constitutional provisions, *viz*:

Amendment (V) of the Constitution of the United States, is:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis added)"

It is also provided by Amendment (XIV) of the Constitution of the United States, in part, as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws."

Amendment VII of the Constitution of the United States also is:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT

Beginning August 9, 1963, and for a term of one year thereafter, the Respondent issued an automobile insurance policy to Gustav K. Andeen (Page 66, Abstract; 508 Transcript). It included Section II, entitled "Protection Against Bodily Injury by Uninsured Vehicles" as follows (Page 76, Abstract; 518, Transcript):

> "Coverage U—Damages for Bodily Injury Caused by Uninsured Vehicles
>
> "To pay all sums which the Insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an Uninsured Vehicle because of bodily injury, including death, resulting therefrom, hereinafter called 'bodily injury', sustained by the Insured, caused by accident and arising out of the ownership, maintenance or use of such Uninsured Vehicle; * * * "
>
> "Exclusions Under Section II
>
> "This policy does not apply under Section II:
>
> "(1) to bodily injury to, or death of an Insured with respect to which such Insured or his representative shall, without the written consent of the Company, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefor;" (Abst. 79.)
>
> * * *
>
> "Action Against the Company
>
> "No action shall lie against the Company until after full compliance with all terms of this Section.
>
> "Arbitration
>
> "If any person making claim hereunder and the Company do not agree that such person is legally entitled to recover damages from the owner or operator of an

> Uninsured Vehicle because of bodily injury to the Insured, or do not agree as to the amount of payment which may be owing under this Section, then, upon written demand of such person or upon written demand of the Company, the matter or matters upon which such person and the Company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, * * *".

During the term of the policy the insured vehicle was involved in a collision with another vehicle driven by a motorist who had no automobile insurance. The Respondent's insured, Gustav K. Andeen, and another person in the car, August Robert Carlson, were killed. (Pages 51 and 59, Abst.; 493, Transcript). Negotiations took place between the Respondent's claimsmen and the attorneys for the Estates of the Deceased (Page 65, Abst.; 507, Transcript). Although certain benefits were paid under other provisions of the policy (Page 66, Abst.; 508, Transcript), the questions concerning liability coverage claimed for these deaths were not resolved. Suits were filed (Page 13, Abst.; 455, Transcript). The attorneys for the Estates on September 14, 1964, wrote the following letter to the Respondent:

> "Enclosed please find copies of complaint which we have this day filed in the Rock Island County Circuit Court, and which arise out of the collision between your insured, Gustav Andeen, and John Roxlau at 30th Street and 31st Avenue, Rock Island, Illinois, on September 22, 1963. According to our information, Mr. Roxlau did not have any insurance."

The Respondent did not reply.

A Supplemental letter renewing the first was sent to the Respondent October 16, 1964 (Page 16, Abst.; 458, Transcript). The Respondent again elected not to answer.

The Complaint, copies of which were tendered to Respondent with the first letter, contained a jury demand. October 30, 1964 the uninsured motorist, who was the named defendant, was defaulted, plaintiffs, Respondents here, withdrew their jury demand, hearing on damages only was had and the maximum authorized under the Illinois Statute on wrongful death, $30,000., plus other recoverable items, was ultimately returned in favor of either Estate. Execution was returned "Not Satisfied" March 3, 1964 (Page 61, Abst.; 503, Transcript). The next day the Plaintiffs sued this Petitioner for $60,000., the total of the judgments for the deaths (Pages 1-4, Abst.; 443, Transcript). This Respondent moved to dismiss (Page 19, Abst.; 461, Transcript) and its Motion was denied and it filed a Demand for Arbitration under Section II, "Exclusions, etc.", of the Policy. It also filed a jury demand and an answer and affirmative defenses (Page 22, Abst.; 464, Transcript). It alleged its election not to answer the letters was not a waiver of the policy provision and was not a "written consent"; that the judgments were recovered against the uninsured motorist in violation of the written consent clause and were not binding on the Respondent; and, alternatively, that the arbitration demand it had presented should be honored.

Over the Respondent's protest, trial was had without a jury (Page 55-57, Abst.; 497, Transcript). The undisputed evidence also showed that a representative of the Respondent told the attorneys for the Estates that the Respondent would not approve the filing of the damages action against the uninsured motorist (Page 66, Abst.; 508, Transcript) and that it did not give written consent, as contemplated by the policy (Page 114, Abst.; 556, Transcript).

No arbitration was held (Page 114, Abst.; 556, Transcript).

In its Answer, filed after its Motion to Dismiss the Complaint had been denied, this Petitioner, in the Circuit Court, interposed immediately its jury demand along with its affirmative defenses (Page 22, Abst.; 464, Transcript). This injected implicitly the jury guarantee provisions of Amendment (VII) of the Constitution of the United States. The constitutional rights of this Petitioner, therefore, under the Federal Constitution, were asserted unmistakably in its first pleading on the merits in the trial court. It is recognized that the right to a jury trial is confined to those areas in which such trial was properly afforded at the time the Amendment guaranteeing such right became part of our basic law. Where damages are claimed, it is peculiarly within the purview of the right to trial by jury. Moreover, the contractual covenant entered into when the named insured, Gustav Andeen, accepted the policy of insurance (Page 66, Abst.; 508, Transcript) gave the present Petitioner the right to arbitration. This right is not circumscribed by any requirement as to time and this Petitioner, as Defendant in the Circuit Court, asserted this right at the time it filed its first pleading on the merits in its Third Affirmative Defense (Page 26, Abst.; 468, Transcript). The property rights of this Petitioner were contractually protected by the arbitration provisions of the policy and the judgments of all three courts of Illinois, including the Supreme Court of that State to which Certiorari is now sought, denied this Petitioner its right of arbitration. The rationale that it was not filed on a timely basis does not supply the element of due process in depriving this Petitioner of its constitutionally guaranteed property rights. The right to

peaceable enjoyment of one's property and protection against being deprived of it without due process of law are assured by the Fifth and Fourteenth Amendments to the Federal Constitution. Furthermore, the right to trial by jury is guaranteed by Seventh Amendment. The Trial Judge in the Circuit Court of Rock Island County erroneously held that no issues of fact were involved and tried the case without the jury over the objection of this Defendant (Pages 55-57, Abst.; 497, Transcript). There were serious questions of fact. Included were whether the demand for arbitration was filed on a timely basis, whether the present Petitioner (Defendant then) tacitly consented or refused to consent to the damages suit filed against the uninsured motorist and whether the amount awarded on the death claims was a correct factual measure of the losses sustained by the respective estates. The arrant refusal of the Circuit Court to set out the case for trial before a jury prejudiced this Petitioner and deprived it of its guaranteed right to trial by jury. Moreover, depriving it of its contractual right to arbitration denied this Petitioner due process of law and its present obligation to pay the sum awarded against it amounts to unconstitutional inroads upon its property.

Under the provisions of Rule 23, 1 (f), this Petitioner, therefore, raised two Federal questions in the first stage of the proceedings, *viz,* when it filed its initial pleading on the merits in the Circuit Court of Rock Island County.

In addition to the Federal right to trial by jury, this right is guaranteed by the provisions of Chapter 110, Section 64, Illinois Revised Statutes, 1963. This is conditioned upon following the statutory requirements and filing a prompt jury demand. This was complied with here. In *Rosenbaum* v. *American Surety Co.*, 11 N.Y. (2d) 310, 183 N.E. (2d) 667, it was held that a jury trial is necessary to

determine whether the opposing driver was operating an uninsured vehicle. Furthermore, a right to a determination by a jury of the reasonableness of the course of action adopted by this Petitioner with regard to the submission of the copies of the Complaint by the Attorneys for the Estate (Page 12, Abst.; 454, Transcript) likewise involved a right under the jury trial holdings of the *Rosenbaum* case. Factually, the Andeens have the burden of proving that Roxlau was operating "an uninsured vehicle." It was held in *Levy* v. *American Auto Insurance Co.*, 31 Ill. App. (2d) 157, that this is a finding of fact. And wherever a factual issue exists, and a party demands that it be resolved by jury verdict, he is entitled to a jury determination.

Although Country Mutual had demanded a jury trial, the Court proceeded to hear evidence that Roxlau was intoxicated, drove through a stop sign, and pled guilty to reckless homicide. The Court also admitted into evidence the entire report of proceedings of the plaintiffs' action against Roxlau, which includes hospital records consisting of 175 pages, testimony of a police officer based upon a police report and a blood alcohol report; Roxlau's criminal proceeding, including grand jury report, indictment, arraignment, and all proceedings including terms of probation; and coroner's inquest reciting facts of the collision and recommending that Roxlau be held on a charge of manslaughter.

Much of this evidence would be inadmissible in any proceeding. All of it was improper in this case where defendant had demanded and was entitled to both a jury trial and arbitration.

Moreover, agreements to arbitrate disputes arising in the future are valid, binding and enforceable (*Interstate Bakeries* v. *Teamsters*, 31 Ill. (2d) 317; *Davenport* v. *Proc-*

tor & Gamble Mfg. Co., 241 Fed. (2d) 511.) The enforceability of a contract to arbitrate is not peculiar to the law of Illinois nor to the Federal Judiciary, although the *Interstate Bakeries* case and the *Davenport* case demonstrate it is adopted in both of these forms. For example, in *Kirouac* v. *Healey*, 181 Atl. (2d) 634, decided in the Supreme Court of New Hampshire, the arbitration right is correlated with the "written consent" covenant of the policy. In that case, the Supreme Court of New Hampshire remarked:

> "By the terms of the policy, if the plaintiff who has brought suit against the uninsured motorist intends to seek to recover from the insurer, he will be faced with the alternative of obtaining the company's consent to judgment against the motorist, or of relying solely upon arbitration of his claim against the company. Assuming that before the entry of judgment in the pending action, consent to the action is given by the insurer so that coverage is maintained, such coverage is then still subject to the proviso that the insurer's obligation shall be determined by agreement, or failing agreement, by arbitration, which may be demanded by either party."*

The loss by this Petitioner of its constitutional right in its property, without due process, and the speciousness of the judgments below, are further demonstrated by the Courts' holding, in effect, that this Petitioner was obligated to assign a reason or give an explanation for its failure to give written consent. This is not consonant with either the obvious intention of the contract of insurance nor with judicial construction previously approved. (*Allstate Insurance Co.* v. *Charneski*, 114 N.W. (2d) (Wiscon-

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* Discussion concurring in this principle is contained in: 53 Illinois Bar Journal 401.

sin) 489; *Chernick v. Hartford Accident & Indemnity Co.*, 187 N. Y. Sup. (2d) 534. Affirmed: 8 N.Y. (2d) 756.)

The improper deprivation of this Petitioner's property without due process is further pointed up by the Courts' holding on the timeliness of the arbitration demand. There is simply no reasoning to support this conclusion. The Illinois statute specifically provides for hearing on a demand for arbitration after an action is already in a court of law. Chap. 10, § 102 (c) Ill. Rev. St. The Statute further states:

> "Any action * * * involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section * * *." Chap. 10, § 102 (d) Ill.Rv.St.

In ruling on the request for arbitration the court is not to consider the merits of the arbitrable issues. (Introductory Note, Smith-Hurd Pocket Parts, Illinois Revised Statutes, 1964.) Moreover, there is no provision in the policy contract as to when the demand for arbitration shall be made. In *Niazi* v. *St. Paul Mercury Ins. Co.*, 121 N.W. 2d 349, the Minnesota court said that arbitration could be had some two and one-half years after the accident, and that law proceedings which had been instituted should be stayed pending the arbitration. In the *Niazi* case the parties discussed coverage and intermittently negotiated for settlement for some twenty-two months after the accident. The insureds then sued the insurance company in a court of law. The insurer filed a demand for arbitration which was done imperfectly since copies were not sent to the American Arbitration Association. Seven months after the action was filed, the insurance company requested a stay of proceedings to permit arbitration, and this was granted by the court. It was held that the in-

sured had not been prejudiced by any delay because the insured also retained a right to institute arbitration proceedings on his own motion at any time.

In the Federal Court it has been held that a delay of nine years in making a demand for arbitration under a contract provision therefor does not constitute *laches* sufficient to bar enforcement of the arbitration provision, even though the analogous statute of limitations allows only six years. (*Reconstruction Finance Corp.* v. *Harrisons & Grosfields Ltd.*, 204 Fed. 2d 366; Cert. den., 346 U.S. 854.)

CONCLUSION

There are other grounds which this Petitioner believes are compelling in supporting a reversal of the judgment of September 22, 1966 in the Supreme Court of the State of Illinois and of the judgments of the Appellate and Circuit Courts of that jurisdiction. These will, if this Court allows this Petition, be disclosed in the portions of the Record to be printed under the provisions of Rule 26 of the Rules of this Court at that time. At this time it is respectfully submitted that there are federal questions under the constitutional amendments guaranteeing against deprivation of property without due process of law and assuring any litigant a jury trial upon the making of a proper demand. This Petitioner's constitutional rights have been denied it and it is respectfully urged that this Court should allow this Petition and review this cause and reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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